No. 89-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioner,

v.

BANNER INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The statutory provisions that govern the question presented in the instant case are straightforward. Section 4221(a) of ERISA, 29 U.S.C. § 1401(a) directs that "[a]ny dispute between an employer and the plan sponsor . . . concerning a determination made under sections 1381 through 1389 of this title shall be resolved through arbitration" and prescribes definite time periods within which arbitration proceedings may

be commenced. Section 4221(b) of the same statute, 29 U.S.C. § 1401(b) provides that "[i]f no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor."

Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States"), as a plan sponsor, determined in the instant case that respondent Banner Industries, Inc. ("Banner") owed certain amounts as withdrawal liabilities and demanded payment of those amounts in accordance with a schedule set forth in the demand. Banner initiated no arbitration proceeding within the time periods prescribed in subsection (a). The district court in this case, however, instead of holding that the amounts demanded became due, as subsection (b) provides, entered an order that permitted Banner to commence arbitration after the prescribed period and thus to avoid the consequence mandated in that subsection for Banner's failure to observe the statutory time limits.

ARGUMENT

I

The district court's interference with the explicit scheme adopted by Congress— and the affirmance of that action by the court below—squarely conflict with the rule followed in the District of Columbia Circuit. That circuit applies 29 U.S.C. § 1401(b) as written, in accordance with a rule that was first articulated as follows in *Grand Union Co. v. Food Employers Labor Relations Association*, 808 F.2d 66 (D.C. 1987):

> "Arbitrate first" is indeed a rule Congress stated unequivocally. . . . [I]nitial recourse to arbitration is a statutory direction, one generally to be followed unless neither party timely presses the plea in abatement, *and* the court finds that deferring a court contest while the parties repair to arbitration "will neither lead to the application of superior expertise nor promote judicial economy."

Id. at 70 (emphasis in original). The rule was subsequently invoked in *I.A.M. Nat'l Pension Fund, Plan A v. Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987) and explicitly reaffirmed in the following passage:

> "We emphasize that it should now be crystal clear in light of *Grand Union* that attempts to bypass arbitration should uniformly fail except in the narrow circumstances specified in that case.

Id. at 428, n. 23.

By contrast, the court below construed 29 U.S.C. § 1401(b) as subject to a doctrine described as "equitable tolling." Although the court below did not, in the instant case, specify the circumstances under which tolling under that doctrine would be appropriate (Pet. App. C 20a), subsequently in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Central Transport, Inc.*, Nos. 88-2604 and 88-2826 (7th Cir. October 31, 1989), the court described its ruling in the instant case as follows:

> In essence, we determined [in *Banner*] that actively pursuing a legitimate issue of sta-

> tutory construction in federal court *will* toll the period during which arbitration must begin.
>
> Having determined in *Banner* that the time period for seeking arbitration *is* equitably tolled by pursuing nonfrivolous litigation in district court, *we are compelled* to find that the defendants' objection to the Fund's claim of withdrawal liability in the bankruptcy court similarly tolled the time period under section 1401(a)(1).

Supp. Br. App. 6a-7a (emphasis added).

The decision in the court below and the decisions in the District of Columbia Circuit could hardly be more in conflict. The court below has espoused a lenient doctrine of "equitable tolling" under 29 U.S.C. § 1401(b), which compels the court to extend the statutory period when an employer pursues "nonfrivolous litigation in district court." *Id.* The District of Columbia Circuit recognizes no such doctrine and, on the contrary, has held that the district court errs by extending the statutory period under that circumstance.

II

Banner's opposition employs several lines of argumentation in a vain effort to reconcile the irreconcilable decisions of the District of Columbia Circuit and the court below. First, Banner maintains that the only question of law raised in the instant petition is whether the statutory limitation period for initiating arbitration "may be tolled under any circumstances" and argues that "no conflict exists on the legal issue

of whether tolling *can* be applied to MPPAA." Opp. 7, 9. The flaw in that argument lies in Banner's misconstruction of the question presented. The actual question presented is whether the plainly expressed Congressional intent bars a judicial extension of the period because the employer pursues "nonfrivolous litigation" instead of initiating arbitration. On this question of law—which does not materially differ from the question framed in the petition (Pet. i) and the question framed in Banner's opposition (Opp. i)—the court below and the District of Columbia Circuit have reached conclusions that are diametrically opposed.

Banner also attempts to avoid the conflict in the two courts of appeals' decisions by contending that the instant case and the District of Columbia case (*Clinton Engines*) are "easily distinguished." Opp. 9. Neither proposition upon which Banner relies to distinguish *Clinton Engines* from the instant case, however, is accurate as a matter of fact. The employer in *Clinton Engines* did not, as Banner erroneously asserts, "*admit*[ ] that an arbitrator *had jurisdiction* to decide its challenge to the fund's assessment." Opp. 9 (emphasis in original). On the contrary, one of the two employers in that case, Cooper Industries, argued that "because there is no disagreement over the facts in this dispute, arbitration is not mandated under Section 4221 of ERISA [29 U.S.C. § 1401]." *Clinton Engines*, 825 F.2d at 421. Cooper Industries thus did not admit that the arbitrator has jurisdiction, but like Banner in the instant case, Cooper asserted that the dispute was not arbitrable and did not initiate arbitration proceedings within the statutory period.

Banner also errs in stating that "the employers in *Clinton Engines* waited for the fund to bring a col-

lection action before raising any defenses." Opp. 9-10. On the contrary, one of the employers (again Cooper Industries) promptly responded to the plan's August 9, 1984 demand for payment with an August 31, 1984 request for administrative review in which it asserted that "arbitration is not mandated" and that the "dispute over the requirements of Section 4204 will be ripe for litigation upon our receipt of an adverse determination under Section 4219(b)(2)." *Clinton Engines*, 825 F.2d at 420-421. The sequence of events following Cooper's request for review is described as follows in the *Clinton Engines* opinion:

> Having received no payments from Cooper, the Fund filed this collection action on November 1, 1984. *See* 29 U.S.C. § 1401(b)(1). Four days later, the Fund notified Cooper that the Fund stood by its earlier determination, thereby rejecting Cooper's arguments with respect to the sale of the Airmotive Division. *See* 29 U.S.C. § 1399(b)(2)(B). This notification triggered the sixty-day period during which either Cooper or the Fund could initiate arbitration under the MPPAA. *See id.* § 1401(a)(1). Cooper chose, however, not to avail itself of this arbitral opportunity. Instead, it responded to the Fund's collection action by filing a counterclaim seeking a declaration of its rights and an injunction against the Fund's collection efforts.

Clinton Engines, 825 F.2d at 421.

In sum, the facts in *Clinton Engines* are not distinguishable from the circumstances in the instant case. Both Banner and the employer in *Clinton En-*

gines challenged the arbitrability of the dispute before the statutory period for arbitration had expired, both chose to proceed in court and not to initiate arbitration proceedings during the statutory period and both argued that their court proceedings (in which Cooper actually prevailed) should be a basis for allowing them to commence arbitration proceedings after the court determined the arbitrability question against them. The only material difference between *Clinton Engines* and the instant case lies in the result. In *Clinton Engines* the District of Columbia Circuit rejected the employer's plea; in the instant case, the court below accepted it.

III

Banner's final argument in opposition to the petition is that, since an issue of arbitrability was raised in the district court, a requirement that it also comply with Section 1401(a) and timely initiate arbitration proceedings would create "an intolerable dilemma" that can be avoided only by the lenient tolling rule adopted by the court below. As is the case with Banner's other contentions, the "intolerable dilemma" argument is best answered by the opinion of the District of Columbia Circuit in *Clinton Engines*. As the court explained—

> The employers could have elected conditionally to initiate arbitration while making interim payments and, in the meantime, seeking a declaratory judgment on the question whether these defenses had to be submitted to arbitration and, if not, whether they were meritorious.

Clinton Engines, 825 F.2d at 428. The availability of this simple procedural step effectively dispels any "dilemma" conjured up by Banner.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition and supplemental brief previously filed in support of the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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